

STATE OF MICHIGAN
COURT OF APPEALS

HERBERT JERNUKIAN, JR.,

Plaintiff-Appellant,

v

JULIE HOEGMAN,

Defendant-Appellee.

UNPUBLISHED

May 24, 2007

No. 274415

Macomb Circuit Court

LC No. 2006-000731-NO

Before: White, P.J., and Saad and Murray, JJ.

WHITE, P.J. (*dissenting*).

I respectfully dissent.

Plaintiff was injured when defendant drove her car into an intersection against the red light and struck the car plaintiff was driving. An ambulance transported plaintiff from the scene to the hospital. Plaintiff initially complained of pain in his neck, both knees, left arm and shoulder, and right hand. Following treatment by an orthopedist and physical therapy, plaintiff's knees and neck improved, and plaintiff also indicated that he did not have any problems with his right hand that were related to the accident. However, plaintiff suffered a torn rotator cuff in his left shoulder, attended at least thirty-eight sessions of physical therapy, and testified at deposition in June 2006, fourteen months after the accident, that he was still treating at the Michigan Pain Clinic for his left shoulder pain. A surgical repair was medically recommended, but plaintiff is not a good surgical candidate because of preexisting pulmonary disease.¹

The circuit court granted summary disposition in favor of defendant, simply ruling that plaintiff's "general ability to lead his normal life has not been affected by this accident based upon all of the documents that have been provided."

¹ Plaintiff was 67 years old at the time of the accident, and before the accident had existing medical conditions including chronic obstructive pulmonary disorder, emphysema, atherosclerotic vascular disease, an aneurysm of the thoracic and abdominal aorta with an enlarged heart, osteoarthritis, hypertension, and multi-level degenerative disc disease.

A serious impairment of body function is an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life. MCL 500.3135(7). To be generally able to lead a normal life, a person must be able to lead that life for the "most part." A court should consider (1) the nature and extent of the injury, (2) the type and length of treatment required, (3) the duration of the impairment, (4) the extent of any residual impairment, and (5) the prognosis for eventual recovery. *Kreiner v Fischer*, 471 Mich 109, 133-134; 683 NW2d 611 (2004), *supra* at 133-134. In determining whether a plaintiff is able to lead his or her normal life, the court compares the plaintiff's life before and after the injury as well as the significance of any affected aspect of the plaintiff's life. Whether a plaintiff is generally able to lead his or her normal life requires considering whether the plaintiff is, "for the most part" able to lead his or her normal life. *Kreiner*, *supra* at 130. Further, generally subjective complaints of pain do not constitute an objectively manifested condition and cannot establish the existence of a serious impairment of a body function. *Garris v Vanderlaan*, 146 Mich App 619, 622; 381 NW2d 412 (1985). Also, self-imposed limitations are typically not sufficient to create a serious impairment of a body function. *Kreiner*, *supra* at 133, n17.

In the instant case, plaintiff was 67 years old at the time of the accident, see n 1 *supra*, and last worked around the year 2000. As a result of the accident, plaintiff suffered injuries to his knees, hands, left shoulder, and neck. Plaintiff testified at deposition regarding the injuries to his right knee, hands, and neck, that they had improved after physical therapy, draining of fluid, and some pain medication.

However, the left shoulder torn rotator cuff plaintiff suffered as a result of the accident required more extensive and longer treatment and continued to cause plaintiff pain and restrict his movements and physical activity more than one year after the accident. Physical therapy records submitted below, and dated October 21, 2005 (six months post-accident), state that plaintiff could "not do at all": push/pull, lift/carry, and heavy work. Medical records plaintiff submitted below show that as of March 27, 2006 (nearly one year after the accident), plaintiff had treated at the Pain Clinic 38 times. Plaintiff testified at his deposition, taken fourteen months after the accident, that he continued to treat at the Pain Clinic, and that because of the pain caused by his left shoulder torn rotator cuff "there isn't hardly anything I can do." Plaintiff testified that he cannot do just about anything that takes "any strength," such as lifting, pushing, and yard work. Plaintiff testified that before the accident, he was physically able to do these things. Regarding yard work, before the accident although he had to stop every few minutes because of his pre-existing lung condition, he did yard work regularly. Plaintiff testified that Dr. Pellerito, his treating doctor for the torn rotator cuff, told him he could not do any yard work after the accident. Plaintiff also testified that because of the pain caused by his left shoulder, he has difficulty dressing himself and taking a shower at times. Medical records dated February 6 and 8, 2006 (ten months post-accident) state that plaintiff experienced increased pain after leaning on his left arm while drinking coffee. Later that month, plaintiff reported shoulder "has good and bad days but overall improving." Medical records dated February 22, 2006, state that plaintiff's left shoulder function has not improved. In March 2006, plaintiff had a cortisone shot and reported decreased pain. On March 6, 2006, plaintiff reported that he had accidentally lifted something over the weekend and had increased pain and was very sore. On March 20, 2006 plaintiff reported it was a bad day for his left shoulder, and on March 27, 2006 (eleven months post-accident), reported he still had shoulder pain. As noted above, surgery was recommended

for the torn rotator cuff, but plaintiff's pulmonary doctor recommended surgery be avoided because of plaintiff's lung condition.²

I conclude that regarding his left shoulder torn rotator cuff, plaintiff presented evidence sufficient to raise an issue of material fact that he suffered a serious impairment of a body function that affected his general ability to lead his normal life. *Kreiner, supra*. I would reverse.

/s/ Helene N. White

² Plaintiff also testified regarding his left knee that he had physical therapy until approximately April 2006, i.e., until one year after the accident, and that it still bothered him a little now. He also testified at deposition that his neck bothers him whenever he tries to stretch.